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Part 1

BUY AMERICAN ACT OF 1987

APRIL 9, 1987.—Ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1750 which on March 23, 1987, was referred jointly to the Committee on Government Operations, and the Committee on Ways and Means]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Operations, to whom was referred the bill (H.R. 1750) to amend the Buy American Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Buy American Act of 1987".

SEC. 2. AMENDMENTS TO THE BUY AMERICAN ACT.

Title III of the Act of March 3, 1933 (41 U.S.C. 10a-10d), is amended by adding at the end thereof the following new section:

"SEC. 6. (a) Subject to subsections (b) through (g) of this section and subsections (e) and (f) of section 305 of the Trade Agreements Act of 1979, a department, bureau, agency, or independent establishment shall not award any contract for the procurement of articles, materials, and supplies mined, produced, or manufactured in a foreign country whose government discriminates in awarding contracts against United States products or services, as certified by the President pursuant to section 305(d)(1) of the Trade Agreements Act of 1979.

"(b) The requirements of subsection (a) shall not apply if the articles, materials, and supplies in question have been assembled or manufactured in the United States and substantially all of the total cost of such articles, materials, and supplies (including components, indirect costs, and labor) is fairly allocable to articles, materi-

als, and supplies assembled, mined, produced, or manufactured in the United States or labor performed or indirect costs incurred in the United States.

"(c) The requirements of subsection (a) shall not apply in the case of a country which (1) is a signatory in good standing of the Agreement on Government Procurement and is not subject to a waiver revocation under section 305(e)(2) of the Trade Agreements Act of 1979, or (2) is not a signatory of such Agreement but is at least developed country (as that term is defined in section 308(6) of that Act).

"(d) The President or the head of a department, bureau, agency, or independent establishment may authorize the award of a contract or class of contracts for the procurement of articles, materials, and supplies mined, produced, or manufactured in countries described in subsection (a) of this section if the President or the head of the department, bureau, agency, or independent establishment—

"(1) determines that such action is necessary (A) in the public interest, or (B) to avoid the restriction of competition in a manner which would tend to create a monopoly for a supplier; and

"(2) notifies the Congress of such determination not less than 30 days prior to awarding the contract or the date of authorization of the award of a class of contracts.

"(e) In no event shall this section be used to deny the award of a contract or contracts when such denial would limit the procurement in question to, or would establish a preference for, the products or services of a single suppliers.

"(f) The authority of the head of a department, bureau, agency, or independent establishment under subsection (d) of this section may not be delegated.

"(g) The authority of the head of a department, bureau, agency, or independent establishment under subsection (d) shall not apply to procurements subject to memorandums of understanding entered into by the Department of Defense (or any agency thereof) and a representative of a foreign country (or agency or instrumentality thereof). In the case of any such procurements, the determinations and notice required by subsection (d) shall be made by the President or, if delegated, by the United States Trade Representative.".

SEC. 3. CONSIDERATION OF COMPLIANCE WITH THE GOVERNMENT PROCUREMENT AGREEMENT IN EXTENDING BENEFITS.

Section 305 of the Trade Agreements Act of 1979 (19 U.S.C. 2515) is amended by adding at the end thereof the following:

"(d) ANNUAL REPORT ON FOREIGN COMPLIANCE.—

"(1) ANNUAL REPORT REQUIRED.—The President shall, no later than December 31, 1988, and annually thereafter, submit to the Congress a report on the extent to which foreign countries, whose products are acquired by the United States Government, discriminate against United States products or services in making government procurements. The President, in the annual report, shall certify the signatories to the Agreement which are not in compliance with the requirements of the Agreement. In addition, from the countries that are not signatories to the Agreement and are not least developed countries, the President shall certify the countries which discriminate in awarding contracts against United States products or services. In making these certifications, the President shall use the requirements of the Agreement as guidelines for evaluating whether the procurement practices of foreign governments are discriminatory.

"(2) CONTENTS OF ANNUAL REPORT.—The annual report required by this subsection shall include (but not be limited to) an evaluation of whether and to what extent countries that are signatories to the Agreement, and all other countries described in paragraph (1) of this subsection—

"(A) use single-tendering procedures for procurements covered by the Agreement that could have been conducted using open or selective procedures;

"(B) conduct what normally would have been one procurement as two or more procurements to bring the anticipated contract value below the Agreement's value threshold;

"(C) announce procurement opportunities covered by the Agreement with less than the required time interval for submitting bids;

"(D) divert procurements that meet the requirements of the Agreement from agencies covered by the Agreement to agencies not subject to the Agreement or to local or regional governments; and

"(E) use specifications in such a way as to limit the ability of United States suppliers to participate in procurements covered by the Agreement.

"(3) ADVICE FROM GOVERNMENT AGENCIES AND UNITED STATES BUSINESSES.—In developing the annual report required by this subsection, the President shall seek the advice of the Secretary of Commerce, the United States Trade Repre-

sentative, and United States businesses in the United States and in countries that are signatories to the Agreement and in all other foreign countries whose products or services are acquired by the United States Government.

"(4) IMPACT OF NONCOMPLIANCE.—The President, in the annual report required by this subsection, shall take into account the relative impact of any noncompliance with the agreement or other discrimination by nonsignatories on United States commerce and the extent to which noncompliance or discrimination has impeded the ability of United States suppliers to participate in procurements covered by the Agreement on terms comparable to those available to suppliers of the country in question when seeking to sell goods under the Agreement to the United States Government.

"(5) IMPACT ON PROCUREMENT COSTS.—Such report shall also include an analysis of the impact on Government procurement costs that may occur as a consequence of any waiver revocations that may be required by subsection (e) of this section and any certifications or other actions taken pursuant to subsection (f) of this section.

"(e) USE OF DISPUTE SETTLEMENT PROCEDURES.—

"(1) INITIATION OF CONSULTATIONS.—The President shall, within 60 days, initiate consultations in accordance with the Agreement's dispute settlement procedures to correct problems with those signatories to the Agreement certified in the annual report (required by subsection (d) of this section) as not meeting the obligations of the Agreement.

"(2) WAIVER REVOCATION.—Where a dispute settlement procedure initiated pursuant to this subsection with any signatory to the Agreement is not concluded within one year from its initiation, such signatory shall be considered as a signatory not in good standing of the Agreement. The President shall revoke the waiver of discriminatory purchasing requirements granted to that signatory pursuant to section 301(a) of this Act. If the President determines that revoking such waiver would harm the public interest of the United States, the President may withhold the revocation of such waiver, but shall, while withholding such revocation, take other actions within his authority consistent with the criteria set forth in sections 2 and 3 of the Act of March 3, 1933 (41 U.S.C. 10a–10d), and with the requirements for full and open competition imposed by the amendments made by the Competition in Contracting Act (P.L. 98–369; 98 Stat. 1175) to impose appropriate and equivalent limitations on Government procurement of products, services, and suppliers of that signatory. The President shall not revoke or modify the waiver as to any procurement or class of procurements where such action would limit the procurement or class of procurements to, or would establish a preference for, the products or services of a single supplier. The President, in taking any action under this subsection to limit procurements from foreign countries, shall seek the advice of executive agencies through the interagency trade organization (established under section 242 of the Trade Expansion Act of 1962) and the advice of United States businesses and other interested parties.

"(3) SETTLEMENT OF DISPUTES.—If, before the end of a year following the initiation of dispute settlement procedures, the other participant to the procedures—

"(A) eliminated the discrimination to the satisfaction of the President,

"(B) takes the action recommended as a result of the procedures to the satisfaction of the President, or

"(C) the procedures result in a determination requiring no action by the other participant,

the President shall take no action to limit government procurement from that participant.

"(4) REINSTATEMENT OF WAIVERS.—The President may reinstate a waiver of discriminatory purchasing requirements that was revoked (or modified) pursuant to paragraph (2) of this subsection at such time as—

"(A) the other participant has eliminated the discrimination to the satisfaction of the President;

"(B) the other participant has taken corrective action required as a result of the dispute settlement procedures to the satisfaction of the President; or

"(C) the procedures result in a determination requiring no action by the other participant.

"(f) DETERMINATION OF DISCRIMINATION BY A NONSIGNATORY COUNTRY.—If the President determines that a certification of discrimination by a foreign country which is not a signatory to the Agreement and is not a least developed country would harm the public interest of the United States, the President shall certify the

country as discriminatory but shall, notwithstanding section 6 of the Act of March 3, 1933, take other actions wihin his authority consistent with the criteria set forth in sections 2 and 3 of the Act of March 3, 1933 (41 U.S.C. 10a–10d), and with the requirements for full and open competition imposed by the amendments made by the Competition in Contracting Act (Public Law 98–369; 98 Stat. 1175), to impose appropriate and equivalent limitations on Government procurements of products, services, and suppliers of that country. The President shall not take any action where such action would limit the procurement or class of procurements to, or would establish a preference for, the products or services of a single supplier. The President, in taking any action under this subsection to limit procurements from foreign countries, shall seek the advice of executive agencies through the interagency trade organization (established under section 242 of the Trade Expansion Act of 1962) and the advice of United States businesses and other interested parties.

"(g) RENEGOTIATION TO SECURE FULL AND OPEN COMPETITION.—The President shall instruct the United States Trade Representative, in conducting renegotiations of the Agreement, to seek improvements in the Agreement that will secure full and open competition consistent with the requirements imposed by the amendments made by the Competition in Contracting Act (P.L. 98–369; 98 Stat. 1175).

"(h) GENERAL REPORT ON ACTIONS UNDER THIS SECTION.—

"(1) ADVICE TO CONGRESS.—The President shall, as necessary, advise the Congress and, by no later than December 31, 1993, submit to the Congress a general report on actions taken pursuant to subsections (d) and (f) of this section.

"(2) CONTENTS OF REPORT.—The general report required by this subsection shall include, but not be limited to, an evaluation of—

"(A) progress by all foreign countries (other than least developed countries) toward eliminating the practices outlined in subsection (d)(3) of this section; and

"(B) actions taken pursuant to subsections (e) and (f) of this section.".

COMMITTEE ACTION AND VOTE

H.R. 1750 was introduced by Congressmen Jack Brooks and Frank Horton on March 23, 1987, and subsequently referred jointly to the Committees on Ways and Means and Government Operations. The Committee on Government Operations ordered the bill reported as amended on April 7, 1987, by a voice vote with a quorum present.

HEARINGS

Hearings on H.R. 1750 were held by the Subcommittee on Legislation and National Security on March 25, 1987. Testimony was received from representatives of the Office of Federal Procurement Policy, the General Accounting Office, the Computer and Communications Industry Association, Harris Corporation, and Smith & Wesson. Testimony was also received from Mr. Clyde Prestowitz, former Assistant Secretary of Commerce.

EXPLANATION OF AMENDMENT

Inasmuch as all after the enacting clause of H.R. 1750 was stricken and all language incorporated into one amendment, this report constitutes an explanation of the amendment.

SUMMARY AND PURPOSE

During the post-World War II years, United States foreign policy focused on the redevelopment of countries devastated by the effects of the war. At that time, our nation enjoyed a broad sphere of influence in the world and maintained relative economic stability at home. Our efforts were successful; indeed, these redeveloped nations have now become major rivals as competitive producers and

sellers in the market places which the U.S. once dominated. They have even captured major shares of our domestic market for items such as steel, electronics, and automobiles.

This heightened competition from abroad is in great part due to the active role played by other governments through participation in subsidizing and financing their own country's business output. In fact, for a number of years this practice was encouraged by the U.S. Government. As such, U.S. companies are facing not just their foreign competitors, but the economic and political might of the host governments as well and, as a result, the life blood of free enterprise in this country is being drained by government supported foreign enterprises.

Clearly, being the best no longer guarantees success in the international market place. Even our high-tech industries, once the undisputed leaders in world markets, have seen their position seriously eroded over the last few years. These discriminatory practices have substantially contributed to the United States' steady loss of world market share and the unprecedented annual trade deficit of almost $170 billion that we now face.

In addition to supporting their domestic industries, many of these same governments have established and maintain national policies to protect them from outside competition. One such policy involves the use of government procurement practices that discriminate against foreign firms. Consequently, U.S. firms not only lose market share in the domestic and third-country markets, but also are prohibited from selling in the competitor's market. Due to this protection, foreign firms can charge higher prices domestically and, with the excess profits, underprice their U.S. competition in the United States and elsewhere. H.R. 1750 specifically addresses the need to encourage other governments to eliminate their discriminatory procurement practices and open their government procurement markets to U.S. competition.

H.R. 1750 enables the President to use access to the U.S. Government's $200 billion procurement market as leverage to encourage other countries to open their government procurement markets to U.S. firms. The bill prohibits U.S. government agencies from purchasing goods from countries whose governments discriminate against U.S. goods and services in making procurements. Firms offering goods produced in countries that are members in good standing of the international Agreement on Government Procurement would continue to have nondiscriminatory access to U.S. government procurements covered by the Agreement. Also, Agreement signatories in good standing and other countries that do not discriminate would continue to be able to participate in all other U.S. government procurements, but must overcome the Buy American price differentials currently imposed on foreign products.

The bill also establishes a mechanism through which the President would identify in an annual report to Congress those countries whose governments discriminate against U.S. goods and services. The President would be required to use the Agreement's dispute settlement provisions to resolve problems regarding compliance with the Government Procurement Agreement. If the dispute settlement procedures are not concluded within a year or if they are concluded and the other country is considered as not in "good

standing", that country would not be allowed to participate in U.S. Government procurements. The bill authorizes the President to reinstate full access when the procedures are concluded and the other country has taken the necessary corrective action. In the case of nonsignatory countries that discriminate, the prohibition would become effective at the issuance of the annual report. As in the case of signatory countries, the President may lift the prohibition at the time the discrimination is eliminated. In all cases, the President is authorized to take action other than total prohibition when it is in the public interest, including situations where such action would create a preference for a single supplier.

BACKGROUND

GOVERNMENT PROCUREMENT AND TRADE

Trade negotiations under the General Agreement on Tariffs and Trade (GATT), the foremost multilateral trade agreement, traditionally had focused on the reduction of tariffs. As tariffs were reduced and no longer represented major impediments to free trade, the need to eliminate nontariff barriers to trade became more evident. One major problem area was the use of government procurement practices which discriminated against foreign suppliers and goods.

Although governments are among the world's largest purchasers of goods and services, prior to the early 1980's their procurements were not covered by provisions of international trade agreements. Recognizing that discriminatory government procurement practices were creating major barriers to free trade, a major objective of the United States during the Tokyo Round of mulitlateral trade negotiations (1973–1979) was to establish an international obligation among signatory countries to eliminate these practices. U.S. negotiators believed that by opening up the procurement systems of other countries, a new market worth tens of billions of dollars would immediately be available to American firms.

At that time, most foreign nations maintained closed procurement systems and only purchased foreign goods when similar products were not available domestically. In contrast, our Federal procurement system was already open to any foreign firm which could overcome relatively modest price differentials established in accordance with the Buy American Act (Title III of the Act of March 3, 1933, 41 U.S.C. 10a–10d). Regulations implementing that Act require federal agencies to give preference to domestic products by adding 6% or 12% for civilian agencies or 50% for defense agencies to the evaluated cost of foreign bids. Further, a product is considered domestic under the Buy American Act provisions if at least half of the costs allocated to its manufacture are incurred in the United States. In addition, the U.S. Government has waived the Buy American requirements for a substantial amount of defense procurements conducted under Memorandums of Understanding with its allies.

In 1979, after several years of negotiations, the United States and 18 other countries [1] signed the International Agreement on Government Procurement. The Agreement establishes open procurement procedures (similar to those contained in the U.S. Government's Federal Acquisition Regulation), which require that covered procurements be fully publicized and consistently administered, and which must cover all aspects of the procurement process. The Agreement currently covers purchases of supplies and equipment valued at $171,000 (1987 dollars) or more made by designated central government agencies, excluding purchases essential to the maintenance of national security and safety.[2] In addition, each signatory excluded certain central government agencies, particularly those that are large purchasers of telecommunications equipment, heavy electrical machinery, and transportation equipment. For the United States, these exclusions include the Departments of Transportation and Energy, the Tennessee Valley Authority, the Army Corps of Engineers, Interior's Bureau of Reclamation, certain parts of the General Services Administration, the Postal Service, COMSAT, Amtrak, and Contrail.

The Agreement also establishes a dispute mechanism, calling for bilateral consultations between disagreeing parties when a problem first occurs. If bilateral consultations fail, either signatory may request that the Committee on Government Procurement of the General Agreement on Tariffs and Trade (GATT), which is composed of representatives from all signatory governments, intercede. Should Committee mediation prove unsuccessful, the parties to the dispute may then ask the committee to convene a panel composed of representatives from signatory countries to review the dispute and report to the Committee "such findings as will assist the Committee in making recommendations or giving rulings on the matter." The Committee, which can either accept or reject the panel's findings, then makes a determination on the matter and, when warranted, recommends corrective action. The signatories recognized the importance of settling disputes in a timely manner and, as such, included recommended time limits for each step of the multilateral process (just under nine months to conclusion).

TRADE AGREEMENTS ACT OF 1979

In July 1979, Congress enacted the Trade Agreements Act of 1979 (Public Law 96-39), which made changes to U.S. law required to implement the agreements reached during the Tokyo Round of Multilateral Trade Negotiations. Title III of the Act provided for the implementation of the Agreement on Government Procurement by (1) permitting the President to waive the Buy American Act price differentials for procurement covered by the Agreement, (2) specifying four circumstances in which the President can designate a foreign country as eligible for a waiver, and (3) prohibiting countries without waviers from participating in procurements cov-

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[1] Austria, Belgium, Canada, Denmark, Finland, France, Hong Kong, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Singapore, Sweden, Switzerland, the United Kingdom, and West Germany. Israel also became a signatory in June 1983.

[2] Amendments to the Agreement adopted in November 1986 and scheduled for implementation in January 1988, among other things, reduce the threshold to $148,000 in 1987 dollars and extend the Agreement to leasing contracts.

ered by the Agreement in an effort to encourage those countries to become signatories.

Title III also imposed substantial monitoring and reporting requirements to ensure that both United States and foreign government procurement practices were in compliance with the Agreement. The importance of these provisions was stressed in the Senate report which accompanied the Act. The Senate stated:

> While the agreement is a good first step in opening up the government procurement market, the agreement, in and of itself, will not guarantee open access or change deeply rooted habits. Only effective, vigorous monitoring and enforcement of the agreement by the U.S. Government can assure that the opportunities the agreement is designed to provide will in fact materialize. (Senate Report No. 96-249, July 17, 1979, page 147.)

In the Trade Agreements Act of 1979 Congress also mandated the reorganization of Executive Branch agencies involved in international trade (primarily State, Commerce and the U.S. Trade Representative) to better implement the Tokyo Round agreements. Congress directed the President to give particular consideration to the need for monitoring compliance with the Government Procurement Agreement in making this reorganization. Again, the Senate report on the Act stated that:

> In this regard, the committee anticipates an upgrading of commercial programs overseas to assure that U.S. trading partners are meeting their trade agreement obligations, including those under the technical specification and tendering information and review procedures of the Agreement on Government Procurement. (Senate Report No. 96-249, July 17, 1979, page 138.)

During congressional deliberations on the Tokyo Round trade package, the Executive Branch had estimated that the Agreement would open billions of dollars in foreign government procurements in 1981 to U.S. firms and about $17 billion in Federal procurements to foreign firms. However, statistics compiled by the General Accounting Office (GAO) during its review of the implementation of the Agreement showed that the first year results fell far below the Executive Branch expectations.[3] GAO found that the foreign signatories to the Agreement opened a far smaller value of procurements to outside competition than had been anticipated—$4 billion, rather than the $20 to $25 billion expected. In comparison, the U.S. government reported it opened over $18 billion to foreign firms under the agreement—more than four times the value of procurements than all other signatories combined.

Clearly, foreign governments have found numerous methods for circumventing the requirements of the agreement in order to continue their discriminatory practices to protect their domestic industries. Primary among these methods are the (1) avoidance of the Agreement's coverage by awarding contracts valued below the re-

[3] The International Agreement on Government Procurement: An Assessment of Its Commercial Value and U.S. Government Implementation. GAO/NSIAD-84-117, July 16, 1984.

quired threshold, and (2) excessive use of noncompetitive procedures. Regarding the first point, GAO found that over half of the contracts awarded by foreign countries in 1981, excluding those for national security purchases, fell below the established value threshold. As a result, over $9 billion worth of procurements expected to be available for competition were reserved for firms residing in those countries.

Further, an additional $4 billion of foreign procurements awarded in 1981, nearly half of those not eliminated by the threshold level, were restricted through the use of single-tendering (sole-source) procedures. The Agreement specifies that these procedures are only to be used limited circumstances, such as when only one supplier can meet the agency's needs, or when the products are so urgently needed that time does not permit full and open competition. Nevertheless, GAO found that in 1981, the Japanese government used single-tendering to award over 65 percent (about $721 million) of its covered procurements, and that the European Communities relied on these procedures for awarding over 50 percent (about $3.2 billion) of their covered procurements. The chart on the following page summarizes signatory governments' performance under the Agreement during 1981.

PROCUREMENT UNDER THE GOVERNMENT PROCUREMENT AGREEMENT DURING 1981

[In millions of dollars]

Country	Estimated	Actual [1]		Falling below the threshold		Covered by agreement		Using single-tendering procedures		Open to foreign participation
Austria	(2)	$156.4		$150.3		$6.1		$1.4		$4.7
Canada	$1,250	969.2		520.4		448.8		125.5		323.3
European communities	10,500	12,231.6		9,096.0		6,135.6		3,178.3		2,957.3
Finland	260	391.5		290.6		100.9		2.4		98.5
Hong Kong	(2)	212.4		46.9		165.5		24.9		140.6
Japan	6,900	1,728.4		656.3		1,072.1		720.9		351.2
Norway	170	548.9		398.1		150.8		4.1		146.7
Singapore	(2)	47.3		17.7		29.6		0		29.6
Sweden	1,100	797.3		701.6		95.7		22.9		72.8
Switzerland	330	357.2		230.8		126.4		33.2		93.2
Total foreign countries.	20,510	17,440.2	minus	9,108.7	equals	8,331.5	minus	4,113.6	equals	4,217.9
United States	17,000	28,916.5	minus	9,028.6	equals	19,887.9	minus	1,853.3	equals	18,034.6

[1] Total nondefense purchases by covered agencies, including procurements falling below the threshold.
[2] Not available.

Source: Based on information supplied by signatory governments.

According to Administration sources, the Agreement signatories are still compiling the data for 1985 and, as a result, up to date procurement data under the Agreement is not available. However, those same sources said that even if it were available, the information would be classified. The most recent information we could publicly disclose, if it had been made available, would be for 1983. This is highly disturbing since Congress and the Executive Branch need information on the procurement activity of other signatories in a timely manner to properly ensure compliance with the Agreement.

Further, to ensure proper oversight of ths process, this information should be unclassified and publicly available.

INDICATIONS OF DEEPLY ROOTED DISCRIMINATION

Despite the lack of data, testimony received during the Subcommittee's hearings on H.R. 1750 indicates that these problems are attributable to the "deeply rooted" discriminatory practices of many countries which, absent forceful action by the United States, will continue to impede progress in our nation's trade position. Mr. Clyde Prestowitz, former counsel to the Secretary of Commerce on U.S./Japan relations and former Assistant Secretary of Commerce, alluded to such discrimination in his testimony. Mr. Prestowitz stated:

> In my experience, the government procurement code in a great number of nations has not provided any benefit to American companies primarily because many countries look upon their government procurement as a strategic matter; that is they use government procurement as a tool of their industrial policy to promote certain domestic interests, and therefore despite their signature of the government procurement code, they do not—do not and will not—intend to adhere to it.

In answer to a question from Congressman Brooks concerning attempts by Cray Research Computer, Inc. to market its supercomputer products in Japan, Mr. Prestowitz provided an excellent example of these nationalistic attitudes as follows:

> Japan passed a law in 1957 called the Law For Promotion of Specified Electronic Industries. That law was renewed in 1962, again in 1972, and again in another form just last year. For 30 years Japan has been promoting its computer industry. It has done this overtly and not in secret. This is written into Japanese law. The Japanese law essentially targets the American industry. Its target is to equal and surpass those companies.
>
> In 1980, Japan announced two projects to develop supercomputers on the basis of its own domestic industries. As soon as it announced those projects, the institutions in Japan which are the primary users of supercomputers, and which happen to be mostly under the ministry of education, simply stopped talking to American suppliers. This is not something new or surprising.

Any doubt about the Japanese position on supercomputers was eliminated the day following the Subcommittee's hearing in a March 26, 1987, Washington Post article. The article reported on a remark made to an American trade delegation by a high ranking Japanese official as follows:

> Makoto Kuroda, vice chief of the Ministry of International Trade and Industry (MITI), told the Americans over lunch that it was a waste of time for the United States to try to sell supercomputers to Japanese government agen-

cies or universities, no matter how superior they were in price or quality.

Two other countries were cited during the hearings as particularly discriminating against suppliers offering U.S. goods—Italy and France. Since the Agreement was signed, Italy's compliance has been totally inadequate. During the first two years of the Agreement, Italy opened only 50 covered procurements to the other signatories. This number increased to 109 in 1986. However, this number is still extremely small for a major industrialized country. In contrast, during 1986 the United States Government awarded (as opposed to simply opened) over 450 procurement contracts worth about $204.5 million to suppliers offering Italian goods and services. This is particularly ironic considering that included among these is a $75 million procurement for Beretta handguns in which the Defense Department did not even open the bid from Smith & Wesson, a major domestic manufacturer.[4] Further, the procurements opened by Italy are most often for items, such as office and janitorial supplies, for which U.S. firms cannot compete against domestic producers mainly due to the transportation costs. There have been virtually no procurements for high-technology items, such as computers, for which U.S. suppliers are highly competitive.

The Subcommittee also received testimony regarding a case in which the French Government, while complying with the letter of the Agreement, clearly violated its spirit and, in so doing, denied U.S. firms access to a particularly lucrative educational computer procurement. GAO testified that:

> This procurement, which was initiated in February 1985, clearly fell under the Government Procurement Agreement. When the French Government announced the procurement, several American firms wanted to compete for the award. The French Government, however, then decided to expedite the purchase by exercising options on previous contracts for a relatively small number of computers that had been awarded to its domestic firms. As a result, U.S. companies, such as Apple Computer, were denied the opportunity to provide tens of thousands of educational computers to the French Government.

In a letter to the Chairman for insertion in the hearing record on H.R. 1750, Apple Computer, Inc., strongly endorsed this legislation. The company also expressed frustration with the difficulties experienced in marketing its products overseas. The letter stated:

> In almost every developing nation in the world, as well as many major industrialized nations such as Korea, Japan, and Brazil, American companies are forbidden or frustrated in their attempts to sell products to the governments of those countries. We experience barriers to free trade even to the domestic commercial marketplace in those countries. These barriers to free and fair trade are erected even by those countries who sell products to the

[4] See House Report 99–652 for a description of problems with the Army's handgun contract.

United States Government, and into the domestic commercial marketplace in America. Our openness is not reciprocated by most foreign governments.

The problems described above demonstrate that USTR must increase its efforts to ensure foreign government compliance with the Agreement. While the United States has fully met its obligations and opened its procurements to foreign competition, other governments have obviously not done so, eliminating most of the commercial value of the Agreement for U.S. firms.

Despite these problems, the U.S. Government has not effectively used the Agreement's dispute settlement procedures. In GAO's 1984 report, for instance, it expressed concern over the inordinately long time period needed to resolve disputes. Although the Agreement itself recommends timeframes for the formal (multilateral) dispute settlements (less than 9 months), in reality, a government can delay the process by continually refusing individuals nominated to set on the panel or delay in collecting information requested by the panel.

The United States' one experience with the formal dispute settlement mechanism demonstrates that other signatories are unwiling to abide by the timeframes. In January 1983, the U.S. formally challenged the European Communities' practice of excluding the value-added tax in determining whether a procurement is above the Agreement's threshold. The United States contended that the Agreement does not permit the exclusion of any form of taxation in making this determination and that this practice may decrease the European Communities' procrements covered by the Agreement. The United States obtained a favorable resolution to this dispute, but not until February 1987—over four years after it sought to have this problem corrected.

GAO testified that the United States has also had little success in encouraging other countries to join the Government Procurement Agreement. The only country to join after the Agreement went into force was Israel in June 1983. As a consequence, discriminatory government procurement practices continue to serve as barriers to export opportunities for U.S. firms. The 1985 *Annual Report on National Trade Estimates*, compiled by the Office of the U.S. Trade Representative, points to the use of such practices by several countries as important nontariff barriers to trade. Countries identified in this report as pursuing strong buy national policies include Argentina, Brazil, and Mexico.

Other less-visible discriminatory procedures are often used by foreign countries to effectively exclude participation by U.S. and other outside firms from participating in their procurements. These procedures include, among other things, (1) making only domestic firms aware of procurements, (2) using specifications that give a competitive advantage to domestic suppliers, and (3) applying criteria that favor domestic suppliers in awarding procurement contracts. Using these and similar procedures, foreign governments have been able to generally restrict foreign participation in their procurements to purchases of products not available domestically. The report further states that, while it is not possible to estimate the dollar impact of such restrictions, U.S. exporters in some cases

would have significant market opportunities if they were allowed to compete freely.

H.R. 1750

The Committee believes that the U.S. government should not purchase goods from countries where U.S. firms are not given a fair opportunity to compete for government procurements. Only by taking meaningful action to limit access to U.S. government procurements by the firms of such countries can the United States encourage their governments to treat U.S. firms fairly in conducting their procurements. In the Committee's view, H.R. 1750 gives the President strong but reasonable measures to combat foreign government discriminatory procurement practices that limit export opportunities for U.S. firms. It provides strong incentives for foreign governments to reduce their use of discriminatory government procurement practices and adhere to the Agreement. It also provides the Executive Branch with a mechanism for ensuring that foreign governments that are signatories to the Agreement meet their obligations.

CREATION OF THREE-TIER SYSTEM

H.R. 1750 prohibits Federal agencies from purchasing goods produced in countries whose governments discriminate against U.S. goods or services in conducting procurements. This bill would replace the present two-tier Buy American price preference system with a new three-tier system. Presently, under the Buy American Act (Title III of the Act of March 3, 1933) and Title III of the Trade Agreements Act of 1979:

Suppliers offering goods from countries that are signatories to the international Agreement on Government Procurement (or have otherwise been granted a waiver under Title III of the Trade Agreements Act of 1979 [5]) can bid on U.S. government procurements covered by the Agreement without the application of discriminatory price preferences.

Suppliers offering goods from these countries and all other countries can bid on other U.S. government procurements but must overcome the 6-, 12-, and 50-percent Buy American discriminatory price differentials to win the contracts.

The three-tier system created by this bill would enable the President to use access to the $200 billion Federal procurement market as leverage to encourage foreign governments to open their procurements to U.S. goods and services. While the bill provides the President some flexibility in awarding procurement contracts, the broad outline of this system is as follows.

Tier 1: Suppliers offering goods from countries that are signatories to the Government Procurement Agreement in good standing (have not had their waiver revoked by the President) and countries

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[5] Under Title III of the Trade Agreements Act of 1979, the President can also grant waivers to countries or instrumentalities, other than major industrial countries, that (1) will assume the obligations of the Agreement and provide appropriate reciprocal procurement opportunities to U.S. products and suppliers of such products or (2) do not abide by the Agreement, but will provide reciprocal procurement opportunities to U.S. products and suppliers of such products; or (3) are least developed countries.

that are least developed [6] would be able to bid on procurements covered by the Agreement without the imposition of Buy American discriminatory price differentials.[7]

Tier 2: Suppliers offering goods from countries that are signatories in good standing of the Government Procurement Agreement, least developed countries, and nonsignatories that do not discriminate against U.S. products or services would be able to bid on procurements not covered by the Agreement, but must overcome the discriminatory price differentials.

Tier 3: Suppliers offering goods from countries that discriminate against U.S. products and services (including Agreement signatories found not to be in good standing) would be barred from participating in U.S. government procurements.

It is anticipated that the system created by this bill would stimulate the business communities of third-tier countries to encourage their governments to eliminate discriminatory procurement practices. If foreign businesses lose sales to the U.S. government because their own governments discriminate against U.S. goods and services, their own self-interest is served by lessening the discrimatory government procurement practices. Such support could serve as a strong impetus for third-tier countries to, at a minimum, remove their discriminatory practices and, possibly, join and adhere to the Government Procurement Agreement. Firms presently producing goods or substantial portions of goods in third-tier countries where governments do not eliminate their discriminatory practices would need to move their production facilities to the United States or other countries. In his March 25, 1987, testimony before the Subcommittee on Legislation and National Security, A.G.W. Biddle, President of the Computer and Communications Industry Association, stated his belief that such action would probably occur, and as a result, economic activity in the United States would be enhanced. It could also enhance economic activity in those countries that use nondiscriminatory procurement practices.

H.R. 1750 would build upon the regulatory guidelines already in place to determine whether a product is U.S.- or foreign-made. Essentially, goods would be treated as U.S.-made when (1) they have been assembled and manufactured in the United States and (2) a substantial portion of their total costs are fairly allocable to U.S. materials or components or to labor performed or indirect costs incurred in the United States. The bill differs from present guidelines in that it includes research and development as part of the indirect cost that may be incurred in the United States.

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[6] "Least developed countries" are defined by section 308 of the Trade Agreements Act of 1979 as countries on the United Nations General Assembly list of least developed countries. These include Bangladesh, Benin, Bhutan, Botswana, Burundi, Cape Verde, Central African Republic, Chad, Comoro, Gambia, Guinea, Haiti, Lesotho, Malawi, Maldives, Mali, Nepal, Niger, Rwanda, Somalia, Western Samoa, Sudan, Tanzania U.R., Uganda, Upper Volta, Yemen.

[7] Section 302 of the Agreements Act of 1979 prohibits the procurement of eligible products covered by the GATT Agreement on Government Procurement from countries which are not parties to the Agreement and supply such products, subject to certain waiver authorities. The purpose of this prohibition is to encourage additional countries to become parties to the Agreement on a basis that provides reciprocal competitive government procurement opportunities to U.S. products and suppliers of such products. The prohibition authority under new section 6(a) of the Buy American Act provided under section 2 of H.R. 1750 is intended to be applied consistently with the existing prohibition under the Trade Agreements Act in order to ensure that the purpose of that provision is maintained.

PROGRAM EFFECTIVENESS AND COST CONSIDERATIONS

H.R. 1750 contains provisions enabling the President to ensure that its implementation does not reduce program efficiency or substantially increase procurement costs. The bill provides that the President or the head of an executive agency may authorize the award of a contract or class of contracts to third-tier countries if he (1) determines that such action is necessary in the public interest or to avoid a situation where only one supplier's products would be available for purchase, and (2) notifies Congress of such determination not less than 30 days before awarding the contract or authorizing the award of a class of contracts.

The bill prohibits the delegation of the authority granted to the head of an agency to waive the requirements of the bill to ensure that responsible government officials give full and proper consideration to each potential waiver. It is also important to ensure that the international trade implications of procurements conducted in accordance with Defense Department Memoranda of Understanding (MOUs) are fully assessed before they are awarded. Consequently, the bill requires that only the President or, if delegated, the United States Trade Representative (USTR), may make a determination to award MOU covered contracts to a third-tier (discriminatory) country.

ASSESSMENT OF FOREIGN GOVERNMENT PROCUREMENT PRACTICES

H.R. 1750 also establishes a mechanism to enhance the U.S. government's ability to assess whether foreign governments use procurement practices that discriminate against U.S. products or services. It would require the President, by no later than December 31, 1988, and annually thereafter, to submit to Congress a report on (1) compliance with the Government Procurement Agreement by signatory countries and (2) the extent to which all other foreign countries whose products are acquired by the United States use discriminatory government procurement practices. The President will need to obtain the most detailed information regarding the procurement practices of the industrialized countries, especially those that are Agreement signatories, and such newly industrialized countries as Brazil, Taiwan, and the Republic of Korea. These are the countries which utilize the most sophisticated discriminatory practices and at the same time have the largest government procurement markets.

In his annual report, the President shall identify (1) those signatories to the Agreement that are not in compliance with its requirements, and (2) those countries included in the annual report that are not signatories to the Agreement (and are not least developed countries) that discriminate against U.S. products and services in awarding government contracts. The bill instructs the President to use the requirements of the Government Procurement Agreement as guidelines for evaluating whether the procurement practices of these governments discriminate against U.S. products and services. Although not perfect, the Agreement serves as an internationally recognized objective standard of nondiscriminatory government procurement procedures. The bill also contains an illustrative list of procurement activities that could be used to vio-

late the Agreement and, thus, discriminate against U.S. goods or services.

The bill also instructs the President to (1) take into account the relative impact of any noncompliance with the Agreement or other discrimination by a nonsignatory on United States commerce and the extent to which such noncompliance has impeded the ability of U.S. suppliers to participate in procurements covered by the Agreement on terms comparable to those available to suppliers of the country in question and (2) include an analysis of the impact on government procurement costs that may occur as consequence of any waiver revocations that may be required or other actions to limit foreign access to Federal procurements.

OBTAINING INFORMATION FOR THE ANNUAL REPORTS

The bill instructs the President, in developing the annual report, to seek the advice of the Secretary of Commerce, the U.S. Trade Representative, and U.S. businesses in the United States and abroad. The President will need to rely heavily on the U.S. business community to provide information on foreign government discriminatory procurement practices. U.S. firms, especially those representatives in foreign countries, are most familiar with foreign government procurement practices. Based on testimony and discussions with business officials, it is apparent that firms already maintain information on foreign government discriminatory procurement practices as part of ongoing business activities in foreign countries. As a result, this bill will not add to the record keeping or reporting requirements of businesses.

In the past, the executive branch has often lacked the hard evidence needed to conclusively demonstrate foreign government noncompliance with the Government Procurement Agreement. In its March 25, 1987, testimony before the Subcommittee on Legislation and National Security, the General Accounting Office testified that, in the past, firms have been very reluctant to seek the assistance of the U.S. government in correcting violations of the Agreement. Complaining to the U.S. government was seen as potentially jeopardizing future sales to the foreign government. Indeed, firms expressed reluctance to appear at our March 1987 hearing because they feared retaliation by foreign governments.

This legislation establishes a mechanism which will reduce the reluctance of firms to come forward with information, regarding not only noncompliance with the Government Procurement Agreement but also discriminatory procurement practices of other foreign governments. Addressing compliance on a country-by-country basis rather than an individual company basis will facilitate the active participation of the business community. Under such a mechanism, it is anticipated that industry groups, such as trade associations, will respond for their members facing foreign discrimination. As GAO testified, foreign governments are less likely to retaliate against a large number of U.S. firms. Should such retaliation take place, it is expected that the President would take forceful action under this and other trade laws to protect U.S. commercial interests.

In compiling the annual report, Executive Branch officials should, among other things, review all publicly available information on foreign government procurements, particularly those covered by the Government Procurement Agreement. To obtain information from businesses, they should (1) seek information from USTR's Industry Sector Advisory Committees (ISACs), (2) place a notice in the *Federal Register* requesting information from U.S. businesses, and (3) instruct the commercial staffs at the U.S. embassies to seek information from the incountry American business communities. The Office of the U.S. Trade Representative will need to draw on the resources of the Departments of Commerce and State, particularly at overseas posts, in compiling the needed information. In its July 1984 report, GAO found that contrary to what Congress had directed in the Trade Agreements Act, the embassies it visited had devoted few resources to this issue. It is expected that the requirement in H.R. 1750 for a report will increase the priority U.S. embassies place on this matter.

PROVISIONS FOR CORRECTING PROBLEMS

The bill instructs the President to resolve problems with foreign government compliance with the Government Procurement Agreement through the Agreements' dispute settlement procedures. Through these procedures, the U.S. government may ultimately need to prove its case before a panel of experts, which, if it found in favor of the United States, would recommend actions needed to correct compliance problems. The bill does not give countries that are not signatories to the Agreement recourse for challenging a certification that they discriminate against U.S. goods and services. However, prior to issuance of the annual report, the President could enter into bilateral consultations with countries, that could be identified as discriminatory in the annual report, to assist them in correcting their discriminatory practices in a manner acceptable to the United States.

The bill gives the President one year to resolve disputes through the Government Procurement Agreement's dispute settlement mechanism before requiring retaliatory action. The dispute must be initiated within 60 days after a certification of noncompliance is made. The President would also be required to take retaliatory action in cases where the dispute settlement procedure is resolved within the year but the other participant has not taken corrective action recommended by the panel to the satisfaction of the President.

The Government Procurement Agreement does not contain provisions allowing signatories to unilaterally place time limits on dispute settlement procedures and take action when procedures exceed those time limits. However, as demonstrated by the value-added case, the Agreement's dispute settlement procedures are cumbersome and take inordinately long to conclude. The Committee does not see this provision as a violation of the Agreement. The United States would only take action when it believes that another signatory has itself violated the Agreement and refused to fairly participate in dispute settlement. In such situations, the U.S. government is fully justified in taking forceful action to uphold the in-

tegrity of the GATT dispute settlement mechanism. One year should be adequate time to resolve disputes, in that it gives three months for bilateral consultation and GATT's recommended period of nine months for formal dispute settlement. The United States must ensure that these procedures are not used to deny to the United States its rightful benefits under the Agreement.

The bill also contains provisions allowing the President to permit foreign suppliers' continued access to U.S. government procurements or to reinstate such access when the dispute is resolved. The bill provides for continued access when (1) the other participant to the dispute settlement procedure eliminates the discriminatory practice to the satisfaction of the President or takes the action recommended as a result of the procedure to the satisfaction of the President or (2) the procedure results in a determination requiring no action by the other participant. Also, the President may reinstate a waiver of discriminatory purchasing requirements that was revoked (or modified) after the conclusion of a year when the above mentioned conditions are met.

PRESIDENTIAL FLEXIBILITY IN TAKING ACTIONS

A complete prohibition of procurements from a particular country may not always be in the public interest of the United States and, as such, the bill contains provisions giving the President flexibility in choosing what action to take. The President, in taking any action under this bill to limit procurements from foreign countries, is first instructed to seek the advice of executive agencies through the Trade Policy Committee, which is chaired by the U.S Trade Representative, and the advice of United States businesses and other interested parties.

If the President, after such consultations, determines that completely prohibiting procurements from a particular country is not in the public interest, he is instructed to impose appropriate and equivalent limitations on U.S. government procurement of products from that country. To the extent possible, the President may have the procurement limitation apply to the same product sector or industry that is affected by the foreign discriminatory practice. The bill requires that any actions taken by the President should be consistent with the criteria set forth in sections 2 and 3 of the Buy American Act and the requirements for full and open competition imposed by the amendments made by the Competition in Contracting Act. The President is instructed not to limit procurements where such action would establish a preference for the product or products of a single supplier. This instruction also includes the situation where several offerors are providing the product(s) of a single manufacturer.

NEGOTIATIONS TO SECURE FULL AND OPEN COMPETITION

The U.S. Trade Representative has attempted to improve the operation of the Government Procurement Agreement by strengthening its transparency requirements (i.e., provisions requiring that covered procurements be conducted in the open), closing loopholes, and extending discipline to areas where currently the Agreement's provisions have proven ineffective. Nonetheless, the Agreement can

be further strengthened, and the requirements imposed by the Competition in Contracting Act set a standard for full and open competition that should be emulated by the Agreement. As a consequence, the bill instructs the President, in conducting the ongoing renegotiations of the Agreement, to seek improvements that will secure full and open competition consistent with the requirements imposed by the Competition in Contracting Act.

PROVISIONS FOR A GENERAL REPORT

After the end of approximately 5 years, Congress may need to evaluate the impact of this bill on opening foreign government procurement markets to U.S. competition. The bill requires that the President advise the Congress as necessary and, by no later than December 31, 1993, submit to Congress a general report on the effectiveness of actions taken to improve compliance with the Government Procurement Agreement and otherwise open foreign government procurement markets.

CONCLUSION

H.R. 1750 is designed to promote the expansion of overseas markets to U.S. firms. It seeks to increase free trade by (1) encouraging other governments to increase foreign competition on their government procurements, and (2) improving compliance by signatories to the Agreement. Because of the benefits provided to signatories under this bill, it would induce other countries to join the Government Procurement Agreement. Since governments are the largest purchasers of goods and services in the world, opening up foreign government procurement to U.S. firms would substantially contribute to reducing the trade deficit and expanding domestic industrial activity.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

Section 1 titles the Act as the "Buy American Act of 1987".

SECTION 2. AMENDMENTS TO THE BUY AMERICAN ACT

Section 2 amends Title III of the Act of March 3, 1933 (41 U.S.C. 10a–10d) by adding at the end thereof the following new subsections:

New subsection 6(a) prohibits departments, bureaus, agencies and independent establishments from procuring goods produced in foreign countries whose governments discriminate in awarding contracts against U.S. products or services. Such countries would be identified in an annual report required by Section (3) of this bill. Subject to new subsection 6(c), pursuant to Sections 10a–10d of the Act of March 3, 1933, agencies would continue to apply the "Buy American" discriminatory price preferences when evaluating bids from suppliers offering goods produced in countries identified as not discriminating against U.S. goods and services.

New subsection 6(b) gives guidelines for determining whether goods are indeed produced in foreign countries. It instructs departments, bureaus, agencies and independent establishments that

goods shall not be considered as produced in foreign countries if the goods in question have been assembled or manufactured in the United States and a substantial portion of the value added to such goods is allocable to materials or components produced in the United States or to labor or research and development that took place in the United States.

New subsection 6(c) authorizes departments, bureaus, agencies and independent establishments, notwithstanding the requirements of new subsection 6(a), to purchase goods produced in a country that (1) is a signatory in good standing of the international Agreement on Government Procurement or (2) is not a signatory to the Agreement but is a least developed country, as the term is defined in Section 308(6) of Title III of the Trade Agreements Act of 1979. Pursuant to section 301(a) of the Trade Agreements Act of 1979, agencies, when conducting procurements covered by the international Agreement on Government Procurement, would not apply the "Buy American" discriminatory price preferences when evaluating bids from suppliers offering goods produced in countries identified in this section. However, these price preferences would apply to other procurements.

New subsection 6(d) authorizes the President or the heads of departments, bureaus, agencies and independent establishments, notwithstanding the requirements of new subsection 6(a), to award contracts or classes of contracts to suppliers offering goods produced in countries whose governments discriminate against U.S. goods or services if (1) they determine that such action is necessary in the public interest or to avoid the creation of a monopoly for a U.S. government contractor and (2) notifies Congress of such determination not less than 30 days prior to awarding the contract or the date of authorization of the award of a class of contracts.

New subsection 6(e) instructs executive agencies that they shall not use the provisions of this section to deny the award of a contract or contracts when such denial would (1) limit the procurement in question to the products of a single supplier or (2) establish a preference for the product(s) of a single supplier.

New subsection 6(f) prohibits heads of executive agencies from delegating the authority granted under new subsection 6(d).

New subsection 6(g) requires that, notwithstanding new subsection 6(d), only the President or the United States Trade Representative may make the determination and provide notice to the Congress necessary to waive the requirements of new subsection 6(a) with regard to procurements awarded under authority of Defense Department Memorandums of Understanding with foreign governments.

SECTION 3. CONSIDERATION OF COMPLIANCE WITH THE GOVERNMENT PROCUREMENT AGREEMENT IN EXTENDING BENEFITS

Section 3 amends section 305 of the Trade Agreements Act of 1979 (19 U.S.C. 2515) by adding at the end thereof the following new subsections:

New subsection (d)(1) requires the President to submit to Congress no later than December 31, 1988, and annually thereafter a report on (1) compliance with the Government Procurement Agree-

ment by foreign signatories to the Agreement (i.e., those identified in new subsection 6(c)(1) of Title III of the Act of March 3, 1933, as having waivers of discriminatory purchasing requirements for procurements covered by the Agreement) and (2) the extent to which all other foreign countries whose products are acquired by the U.S. government, except least developed countries (identified in new subsection 6(c)(2) of Title III of the Act of March 3, 1933), discriminate against U.S. goods or services. The President shall identify in each annual report (1) those signatories to the Agreement which are not in compliance with the requirements of the Agreement and (2) those nonsignatory countries included in the annual report (other than least developed countries) which discriminate in awarding contracts against U.S. goods or services. In making this determination regarding nonsignatories, the President is instructed to use the requirements of the Government Procurement Agreement as guidelines in evaluating whether the procurement practices of foreign governments are discriminatory.

New subsections d(2) through d(5) instruct the President, in preparing the annual reports, to

(1) Include an evaluation of whether and to what extent countries contained in the annual report use an illustrative list of practices that would constitute noncompliance with the Government Procurement Agreement signatories and could constitute discrimination against U.S. goods and services by other countries.

(2) Seek the advice of the Secretary of Commerce, U.S. Trade Representative, and U.S. businessess in the United States and in countries that are adherents to the Agreement and in all other foreign countries whose products are acquired by the U.S. government.

(3) Take into account the relative impact of any noncompliance with the Agreement or other discrimination by nonsignatories on U.S. commerce and the extent to which such noncompliance or discrimination has impeded the ability of United States suppliers to participate in procurements covered by the Agreement on terms comparable to those available to suppliers of the country in question when seeking to sell goods under the Agreement to the U.S. government.

(4) Include an analysis of the impact on government procurement costs that may occur as a consequence of any waiver revocations that may be required by new subsection (e).

New subsection (e)(1) requires the President to, within 60 days, initiate consulations in accordance with the Government Procurment Agreement's dispute settlement procedures to correct any problems with compliance to the Agreement identified in the annual report. Pursuant to new subsection 6(a) of Title III of the Act of March 3, 1933, executive agencies would be prohibited from procuring goods produced in nonsignatory countries certified in the annual report as discriminatory, since such countries discriminate against U.S. goods or services.

New subsection (e)(2) requires that, when a dispute settlement procedure conducted under this section is not concluded within one year or has concluded and the other participant has not taken action required as a result of the procedures to the satisfaction of the President, the President shall (1) revoke the waiver granted

under section 301(a) of the Trade Agreements Act of 1979 or, if the President determines that such action would harm the critical interests of the United States, (2) take other action within his authority to impose appropriate and equivalent limitations of U.S. government procurements of products and suppliers of that country. Such other action must be consistent with the Buy American Act and the Competition in Contracting Act. Pursuant to new subsection 6(a) of Title III of the Act of March 3, 1933, executive agencies would be prohibited from procuring goods produced in signatory countries whose waiver has been revoked, since such countries discriminate against U.S. goods or services. This section further instructs the President not to revoke or modify the waiver as to any procurement or class of procurements where such action would limit the procurement or class of procurements to, or would establish a preference for, the product or products of a single supplier. The President, in taking any action under this section, is also instructed to seek the advise of executive agencies through the Trade Policy Committee and the advice of U.S. businesses and other interested parties.

New subsection (e)(3) instructs the President not to take action to limit government procurement from a participant in a dispute settlement procedure if, prior to the end of a year, (1) the participant has eliminated the discriminatory practice or takes action recommended as a result of the procedures to the satisfaction of the President or (2) the procedures result in a determination requiring no action by the other participant.

New subsection (e)(4) permits the President to reinstate waivers revoked or modified pursuant to new subsection (e)(2) if (1) the other participant has eliminated the discriminatory practice to the satisfaction of the President or (2) the procedures are concluded and the other participant has taken corrective action required as a result of the procedures to the satisfaction of the President or the procedures result in a determination requiring no action by the other participant.

New subsection (f) instructs the President, if he determines that a certification of discrimination by a nonsignatory country would harm the public interest of the United States, to certify the country in question as discriminatory but take other action within his authority to impose appropriate and equivalent limitations on U.S. Government procurements of products and supplies of that country. Such action must be consistent with the Buy American Act and the Competition in Contracting Act. This subsection further instructs the President not to take any action to limit procurements from a country where such action would limit the procurement or class of procurements to, or would establish a preference for, the product or products of a single supplier. The President, in taking any action under this section, is also instructed to seek the advice of executive agencies through the trade Policy Committee and the advice of U.S. businesses and other interested parties.

New subsection (g) instructs the U.S. Trade Representative, in conducting ongoing renegotiations of the Government Procurement Agreement, to seek improvements that would secure full and open competition consistent with the requirements imposed by amendments made by the Competition in Contracting Act.

New subsection (h) requires the President to advise the Congress and submit a general report to the Congress no later than December 31, 1993, on the overall impact of this bill.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

The cost estimate prepared by the Congressional Budget Office under Section 308(a) and 403 of the Congressional Budget Act of 1974 is contained in the following letter from its Director:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 8, 1987.

Hon. JACK BROOKS,
Chairman, Committee on Government Operations, House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1750, the Buy American Act of 1987, as ordered reported by the House Committee on Government Operations, April 7, 1987.

The bill would prohibit federal agencies from procuring goods produced in a foreign country whose government discriminates in awarding contracts against U.S. firms and products. This prohibition would not apply to goods manufactured in the U.S. or to countries that are in good standing with the Agreement on Government Procurement. In addition, the prohibiton would not apply if it were not in the public interest or if it created a monopoly supplier. H.R. 1750 would also require the President to prepare annual reports, the first of which is due December 31, 1988, that certify which foreign countries have discriminated against U.S. firms and goods in making government procurements. The bill would also direct the President to consult with signatories of the Agreement on Government Procurement to resolve disputes and to suspend the provisions of the agreement if a country does not eliminate the discriminatory practice.

By prohibiting federal agencies from procuring goods from firms in certain discriminating countries, this bill would result in decreased competition between firms that supply goods to federal agencies. The decrease in competition would likely result in federal agencies having to pay a higher price to the remaining eligible suppliers for necessary goods. Currently, federal agencies procure about $8 billion worth of goods and services annually from firms in foreign countries. We cannot estimate, however, the amount of such increased costs to the federal government, because it is uncertain how many countries will be found to discriminate against the U.S., which goods would be affected, and how much higher the prices would be. The President's report to the Congress is not expected to result in significant additional costs to the federal government.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

COMMITTEE'S VIEWS ON CBO'S COST ESTIMATE

The Committee disagrees with the CBO's determination that barring foreign companies from the U.S. Government market would likely result in higher costs to Federal agencies. CBO appears to have considered only the short term affects of limiting foreign competitors from discriminatory countries while ignoring the substantial long-term benefits possible to the U.S. economy, including increased tax revenues from U.S. companies. The so-called savings from having foreign firms compete for government procurements would be greatly overshadowed by the loss of jobs, the closing of plants and even the elimination of viable American industries—all of which can have a dramatic, long-term negative impact on the U.S. economy.

Certainly, costs could be increased for Federal agencies in those cases where the elimination of foreign firms would result in only one supplier remaining in the procurement. However, the President has the authority to take actions other than the total prohibition of a foreign firm from entering the U.S. marketplace, if it is in the public interest to do so. In addition, the bill contains safeguards that would prohibit Federal agencies from restricting competition where such action would tend to create a monopoly for one supplier or otherwise limit the procurement in question or establish a preference for the product or products of a single supplier. Thus, the bill continues to require competition and, as such, guards against suppliers gaining windfall profits at the expense of the government. Also, the economic gains from increased domestic manufacturing activity resulting from H.R. 1750 will serve to more than offset any marginal increase in government procurement costs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF MARCH 3, 1933

MAKING APPROPRIATIONS FOR THE TREASURY AND POST OFFICE DEPARTMENTS FOR THE FISCAL YEAR ENDING JUNE 30, 1934, AND FOR OTHER PURPOSES

* * * * * * *

TITLE III

SEC. 6. (a) Subject to subsections (b) through (g) of this section and subsections (e) and (f) of section 305 of the Trade Agreements Act of 1979, a department, bureau, agency, or independent establishment shall not award any contract for the procurement of articles, materials, and supplies mined, produced, or manufactured in a foreign

country whose government discriminates in awarding contracts against United States products or services, as certified by the President pursuant to section 305(d)(1) of the Trade Agreements Act of 1979.

(b) The requirements of subsection (a) shall not apply if the articles, materials, and supplies in question have been assembled or manufactured in the United States and substanially all of the total cost of such articles, materials, and supplies (including components, indirect costs, and labor) is fairly allocable to articles, materials, and supplies assembled, mined, produced, or manufactured in the United States or labor performed or indirect costs incurred in the United States.

(c) The requirements of subsection (a) shall not apply in the case of a country which (1) is a signatory in good standing of the Agreement on Government Procurement and is not subject to a waiver revocation under section 305(e)(2) of the Trade Agreements Act of 1979, or (2) is not a signatory of such Agreement but is a least developed country (as that term is defined in section 308(6) of that Act).

(d) The President or the head of a department, bureau, agency, or independent establishment may authorize the award of a contract or class of contracts for the procurement of articles, materials, and supplies mined, produced, or manufactured in countries described in subsection (a) of this section if the President or the head of the department, bureau, agency, or independent establishment—

(1) determines that such action is necessary (A) in the public interest, or (B) to avoid the restriction of competition in a manner which would tend to create a monopoly for a supplier; and

(2) notifies the Congress of such determination not less than 30 days prior to awarding the contract or the date of authorization of the award of a class of contracts.

(e) In no event shall this section be used to deny the award of a contract or contracts when such denial would limit the procurement in question to, or would establish a preference for, the products or services of a single supplier.

(f) The authority of the head of department, bureau, agency, or independent establishment under subsection (d) of this section may not be delegated.

(g) The authority of the head of a department, bureau, agency, or independent establishment under subsection (d) shall not apply to procurements subject to memorandums of understanding entered into by the Department of Defense (or any agency thereof) and a representatives of a foreign country (or agency or instrumentality thereof). In the case of any such procurements, the determinations and notice required by subsection (d) shall be made by the President or, if delegated, by the United States Trade Representative.

SECTION 305 OF THE TRADE AGREEMENTS ACT OF 1979

SEC. 305. MONITORING AND ENFORCEMENT.

(a) * * *

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(d) ANNUAL REPORT ON FOREIGN COMPLIANCE.—

(1) ANNUAL REPORT REQUIRED.—The President shall, no later than December 31, 1988, and annually thereafter, submit to the Congress a report on the extent to which foreign countries, whose products are acquired by the United States Government, discriminate against United States products or services in making government procurements. The President, in the annual report, shall certify the signatories to the Agreement which are not in compliance with the requirements of the Agreement. In addition, from the countries that are not signatories to the Agreement and are not least developed countries, the President shall certify the countries which discriminate in awarding contracts against United States products or services. In making these certifications, the President shall use the requirements of the Agreement as guidelines for evaluating whether the procurement practices of foreign governments are discriminatory.

(2) CONTENTS OF ANNUAL REPORT.—The annual report required by this subsection shall include (but not be limited to) an evaluation of whether and to what extent countries that are signatories to the Agreement, and all other countries described in paragraph (1) of this subsection—

(A) use single-tendering procedures for procurements covered by the Agreement that could have been conducted using open or selective procedures;

(B) conduct what normally would have been one procurement as two or more procurements to bring the anticipated contract value below the Agreement's value threshold;

(C) announce procurement opportunities covered by the Agreement with less than the required time interval for submitting bids;

(D) divert procurements that meet the requirements of the Agreement from agencies covered by the Agreement to agencies not subject to the Agreement or to local or regional governments; and

(E) use specifications in such a way as to limit the ability of United States suppliers to participate in procurements covered by the Agreement.

(3) ADVICE FROM GOVERNMENT AGENCIES AND UNITED STATES BUSINESSES.—In developing the annual report required by this subsection, the President shall seek the advice of the Secretary of Commerce, the United States Trade Representative, and United States businesses in the United States and in countries that are signatories to the Agreement and in all other foreign countries whose products or services are required by the United States Government.

(4) IMPACT OF NONCOMPLIANCE.—The President, in the annual report required by this subsection, shall take into account the relative impact of any noncompliance with the Agreement or other discrimination by nonsignatories on United States commerce and the extent to which such noncompliance or discrimination has impeded the ability of United States suppliers to participate in procurements covered by the Agreement on terms comparable to those available to suppliers of the country in question when seeking to sell goods under the Agreement to the United States Government.

(5) IMPACT ON PROCUREMENT COSTS.—Such report shall also include an analysis of the impact on Government procurement costs that may occur as a consequence of any waiver revocations that may be required by subsection (e) of this section and any certifications or other actions taken pursuant to subsection (f) of this section.

(e) USE OF DISPUTE SETTLEMENT PROCEDURES.—

(1) INITIATION OF CONSULTATIONS.—The President shall, within 60 days, initiate consultations in accordance with the Agreement's dispute settlement procedures to correct problems with those signatories to the Agreement certified in the annual report (required by subsection (d) of this section) as not meeting the obligations of the Agreement.

(2) WAIVER REVOCATION.—Where a dispute settlement procedure initiated pursuant to this subsection with any signatory to the Agreement is not concluded within one year from its initiation, such signatory shall be considered as a signatory not in good standing of the Agreement. The President shall revoke the waiver of discriminatory purchasing requirements granted to that signatory pursuant to section 301(a) of this Act. If the President determines that revoking such waiver would harm the public interest of the United States, the President may withhold the revocation of such waiver, but shall, while withholding such revocation, take other actions within his authority consistent with the criteria set forth in sections 2 and 3 of the Act of March 3, 1933 (41 U.S.C. 10a–10d), and with the requirements for full and open competition imposed by the amendments made by the Competition in Contracting Act (P.L. 98–369; 98 Stat. 1175) to impose appropriate and equivalent limitations on Government procurement of products, services, and suppliers of that signatory. The President shall not revoke or modify the waiver as to any procurement or class of procurements where such action would limit the procurement or class or procurements to, or would establish a preference for, the products or services of a single supplier. The President, in taking any action under this subsection to limit procurements from foreign countries, shall seek the advice of executive agencies through the interagency trade organization (established under section 242 of the Trade Expansion Act of 1962) and the advice of United States businesses and other interested parties.

(3) SETTLEMENT OF DISPUTES.—If, before the end of a year following the initiation of dispute settlement procedures, the other participant to the procedures—

(A) eliminated the discrimination to the satisfaction of the President,

(B) takes the action recommended as a result of the procedures to the satisfaction of the President, or

(C) the procedures result in a determination requiring no action by the other participant,

the President shall take no action to limit government procurement from that participant.

(4) REINSTATEMENT OF WAIVERS.—The President may reinstate a waiver of discriminatory purchasing requirements that

was revoked (or modified) pursuant to paragraph (2) of this subsection at such time as—

(A) the other participant has eliminated the discrimination to the satisfaction of the President;

(B) the other participant has taken corrective action required as a result of the dispute settlement procedures to the satisfaction of the President; or

(C) the procedures result in a determination requiring no acton by the other participant.

(f) DETERMINATION OF DISCRIMINATION BY A NONSIGNATORY COUNTRY.—If the President determines that a certification of discrimination by a foreign country which is not a signatory to the Agreement and is not a least developed country would harm the public interest of the United States, the President shall certify the country as discriminatory but shall, notwithstanding section 6 of the Act of March 3, 1933, take other actions within his authority consistent with the criteria set forth in sections 2 and 3 of the Act of March 3, 1933 (41 U.S.C. 10a–10d), and with the requirements for full and open competition imposed by the amendments made by the Competition in Contracting Act (Public Law 98–369; 98 Stat. 1175), to impose appropriate and equivalent limitations on Government procurements of products, services, and suppliers of that country. The President shall not take any action where such action would limit the procurement or class of procurements to, or would establish a preference for, the products or services of a single supplier. The President, in taking any action under this subsection to limit procurements from foreign countries, shall seek the advice of executive agencies through the interagency trade organization (established under section 242 of the Trade Expansion Act of 1962) and the advice of United States businesses and other interested parties.

(g) RENEGOTIATION TO SECURE FULL AND OPEN COMPETITION.—The President shall instruct the United States Trade Representative, in conducting renegotiations of the Agreement, to seek improvements in the Agreement that will secure full and open competition consistent with the requirements imposed by the amendments made by the Competition in Contracting Act (P.L. 98–369; 98 Stat. 1175).

(h) GENERAL REPORT ON ACTIONS UNDER THIS SECTION.—

(1) ADVICE TO CONGRESS.—The President shall, as necessary, advise the Congress and, by no later than December 31, 1993, submit to the Congress a general report on actions taken pursuant to subsections (d) and (f) of this section.

(2) CONTENTS OF REPORT.—The general report required by this subsection shall include, but not be limited to, an evaluation of—

(A) progress by all foreign countries (other than least developed countries) toward eliminating the practices outlined in subsection (d)(3) of this section; and

(B) actions taken pursuant to subsections (e) and (f) of this section.

ADDITIONAL VIEWS OF ROBERT S. WALKER

H.R. 1750, the Buy American Act of 1987, is a piece of legislation that must be approached with caution. While I support its purpose, to achieve "a level playing field" for American businesses in their attempts to secure contracts on foreign government procurements, I must note that the bill has moved so rapidly through subcommittee and committee as to make its potential consequences unknown.

An example of the unintended consequences of the fast track legislating on H.R. 1750 can be found in the area of costs. If the anti-discrimination provisions of the bill were to take effect against a country or countries, businesses from those countries would not be allowed to bid on U.S. government contracts. By eliminating some bidders on those contracts, H.R. 1750 would potentially eliminate a great deal of competition in the U.S. market. Because competition brings down costs of contracts, the unintended consequence of the bill would be greater costs to the U.S. government—and American taxpayers—in the procurement process. For this reason, I offered an amendment, now part of the bill, which directs the President, in his annual report to the Congress regarding United States access to foreign government markets, to include an analysis of the impact on U.S. government procurement costs caused by enforcement of the bill's provisions.

All too frequently the Congress acts on legislation with a blind eye to the potential consequences. In the case of the Buy American Act of 1987, the cost factor is just one of those unexamined consequences. My amendment will insure that at the very least we will be fully informed as to those costs.

There are legitimate additional concerns about H.R. 1750 outlined in the dissenting views of my colleagues. While I do not believe, at present, that these concerns merit opposition to the bill, I do feel that the points raised in the views deserve careful consideration before Congress acts on the bill.

ROBERT S. WALKER.

DISSENTING VIEWS OF HON. HOWARD C. NIELSON, HON. AL McCANLESS, HON. LARRY E. CRAIG, HON. JIM LIGHTFOOT, AND HON. ERNEST L. KONNYU

We oppose H.R. 1750, the Buy American Act of 1987, in its present form. While this is a well-intentioned piece of legislation intended to help address serious trade questions, its practical effect is to tie the President's hands as he attempts to forge a tough and effective trade policy.

We do not question the fact that foreign governments have been consistently discriminating against American businesses as they attempt to secure contracts on foreign government procurements. At the same time, we recognize, the United States Government has consistently bent over backwards to be fair in allowing foreign business to compete for federal government contracts in many areas. Reciprocity is definitely needed. Where we differ from H.R. 1750 is in the preferred approach to achieve non-discriminatory procurements by foreign governments.

H.R. 1750 has several flaws. First, it would constrain the President's power to negotiate with foreign governments by mandating rataliation on a strict schedule. Experience has shown that eliminating the President's flexibility in such situations is a no-win scenario. Counter-measures would inevitably be taken by the foreign government involved, and the goal of open markets and free trade would be destroyed.

Second, H.R. 1750 would raise the profile of procurement disputes with foreign governments to a highly visible and formal legal kind of settlement. Businesses attest to the fact that the best and most lasting results are achieved by a decidedly more low-key approach. Since the signing of the International Agreement on Government Procurement in 1979, American businesses have been extremely reluctant to come forward in a public and forceful way to present evidence that they have been discriminated against by a foreign government in its procurement process. They have a legitimate fear that even if they should prevail with the foreign government in this instance, overt or subtle retaliation would be certain to be taken against them by the foreign government with regard to their other business in that country. Those successes which have been achieved have occurred through quiet work under presidential discretion, without going through the dispute settlement mechanism required by H.R. 1750.

Third, the requirement in H.R. 1750 for a fixed period limitation on formal dispute settlement procedures forces the President to consider intentionally violating United States international obligations under the International Agreement on Government Procurement. Since no time limit now exists on dispute settlement cases, the United States would have to take steps against a country even though an international panel of reviewers might not have yet

reached a conclusion on the validity of our claims. As the United States enters a new round of multilateral trade talks aimed at achieving consensus on new trade disciplines, this kind of requirement will not enhance American credibility.

Fourth, it entirely possible that this bill would be very costly to put into effect. While an amendment was added in subcommittee requiring the President to include in his annual report to the Congress a statement of the costs this bill in terms of federal government procurement, H.R. 1750 would still eliminate a great deal of competition in the United States market, resulting in increased costs on many government contracts. In addition, given the extensive reviews required by the legislation, the administrative costs of this bill alone could be substantial.

As the Congress begins to consider major, comprehensive trade legislation that we trust will provide solutions to the serious trade problems confronting America, we believe that the approach of H.R. 1750 is wrong. In our view, this piece-meal approach severely limits the President's flexibility in achieving free and fair trade. There are better, more comprehensive paths to success in trade policy than the one offered by H.R. 1750.

HOWARD C. NIELSON.
AL MCCANDLESS.
LARRY E. CRAIG.
JIM LIGHTFOOT.
ERNEST L. KONNYU.

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